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Out of Jail and Out of Luck: The Effect of Negligent Hiring Liability and the Criminal Record Revolution on an Ex-Offender's Employment Prospects

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NOTES

OUT OF JAIL AND OUT OF LUCK: THE EFFECT OF NEGLIGENT HIRING LIABILITY AND THE CRIMINAL RECORD REVOLUTION ON AN EX-OFFENDER'S EMPLOYMENT PROSPECTS

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[*] J.D. 2009, University of Florida Levin College of Law; B.A. 2006, Florida State University in Philosophy and Finance. I would like to thank my family and friends—especially my parents—for always being there for me. Without all of you, this Note never would have been possible. I would also like to thank my amazing girlfriend, Erin Graham, for unconditionally believing in me and for possessing the peculiar ability to always raise my spirits. And finally, I would like to express my sincerest gratitude to everyone at the *Florida Law Review* for your comments and suggestions. Your tireless dedication and attention to detail do not go unnoticed.

I. INTRODUCTION

In January 1978, Ed Harbour picked up a seventeen-year-old hitchhiker on his Indiana truck-driving route.[1] He brutally raped and beat her, leaving her near death in the sleeping compartment of his truck.[2] Astonishingly, this took place merely one year after Harbour was convicted of the aggravated sodomy of two teenage hitchhikers.[3] An adequate pre-employment inquiry into Harbour's criminal history would almost certainly have resulted in his employer rejecting his employment application and therefore might have prevented the beating and rape of a seventeen-year-old child. Unfortunately, this is not an isolated phenomenon. In fact, because employees commit crimes on a regular basis, pre-employment screening may prevent all kinds of egregious offenses.[4] Therefore, it makes sense that when employers fail to make adequate inquiries into the criminal histories of prospective employees, they may be subject to liability under the doctrine of negligent hiring.[5]

However, the imposition of negligent hiring liability in such circumstances has not been without its societal consequences. This tension is the topic of this Note. In particular, this Note examines one problem flowing from employers' attempts to avoid negligent hiring liability through the use of criminal background checks: drastically reduced employment prospects for ex-offenders. As a solution to this problem, this

1. Malorney v. B & L Motor Freight, Inc., 496 N.E.2d 1086, 1087 (Ill. App. Ct. 1986).
2. *See id.*
3. *Id.*
4. *See* Louis P. DiLorenzo & Darren J. Carroll, *The Growing Menace: Violence in the Workplace*, N.Y. ST. B.J., Jan. 1995, at 24, 24 (discussing the widespread occurrence of workplace violence); Dermot Sullivan, Note, *Employee Violence, Negligent Hiring, and Criminal Records Checks: New York's Need to Reevaluate Its Priorities to Promote Public Safety*, 72 ST. JOHN'S L. REV. 581, 583–84, 600–05 (1998) (mentioning several events of severe workplace violence and concluding that criminal background checks and the threat of negligent hiring liability are necessary to reduce such incidents). This is not to suggest, however, that a significant *percentage* of American crime is committed by on-duty employees. Instead, this Note merely suggests that a fair number of particularly egregious crimes could be avoided via adequate pre-employment screening procedures.
5. *See Malorney*, 496 N.E.2d at 1089 (remanding the case to the trial court for a determination of whether defendant employer was liable for negligent hiring).

Note suggests the imposition of certain national limits on the use of criminal background checks, and concludes that only such an approach would appropriately balance the interests of employers, ex-offender employees, and society at large.

To this end, Part II.A discusses the important role negligent hiring doctrine plays in American employment law. Part II.B then examines the effectiveness of the particular devices employers use to inquire into the fitness of prospective employees and to limit their negligent hiring liability. Part II.B concludes that criminal background checks are the most effective (and thus most used) liability-limiting device.

Part III then turns to the paradox created by the increased use of criminal background checks in employment decisions, a phenomenon this Note terms the "Criminal Record Revolution." Because of the negative stigma attached to criminal records,[6] employers may refuse to hire prospective employees with criminal histories, or at least those with certain convictions, and may discharge employees who run into legal difficulties while employed.[7] At the same time, however, statistics show that 53% of jail inmates were already on probation, parole, or pretrial release at the time of arrest,[8] and that offenders released from prison have more than a 67% chance of being re-arrested for a serious misdemeanor or felony within the three years following their release.[9] In order to break this cycle of recidivism, some statutory protection must be available to employees looking to find meaningful employment. Otherwise—lacking an opportunity to earn an honest living—an ex-offender will have little incentive not to return to a previous life of crime. Accordingly, Part III examines some of the statutory and common law protections available to ex-offender employees and explains why current protections are inadequate as a solution to what has become a national problem. Part IV.A argues that at least some degree of federal preemption is desirable to inject certainty into an area of the law that has traditionally engendered blurry boundaries—the law governing the proper use of criminal records in

6. *See, e.g.*, Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519, 519–21 (1996) (explaining that one of the many consequences of the social stigmatization of criminal conviction is a decrease in interaction with the stigmatized individual, which in turn leads to a decrease in that individual's wages and job opportunities); *see also* Avi Brisman, *Double Whammy: Collateral Consequences of Conviction and Imprisonment for Sustainable Communities and the Environment*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 423, 436 (2004) (explaining that employers fear that prospective employees convicted of crimes will make unreliable employees).

7. *See* Jerold H. Israel, *Excessive Criminal Justice Caseloads: Challenging the Conventional Wisdom*, 48 FLA. L. REV. 761, 764 (1996) (explaining that there is a strong public policy in "tagging" the convicted criminal with a criminal record).

8. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, http://www.ojp.usdoj.gov/bjs/crimoff.htm (last visited Feb. 24, 2009).

9. *Id.*

employment decisions. Part IV.B suggests the proper scope of such a solution in light of employers' and employees' competing needs, and concludes that New York's approach[10] best balances these needs. Specifically, Part IV.B suggests that all employers (both public and private) should be prohibited from making adverse employment decisions on the basis of past *offenses* that did not result in conviction. Moreover, adverse employment decisions based on past *convictions* should be permitted only where (1) there is a direct relationship between the past conviction and the specific employment sought or held; or (2) the specific employment sought or held would pose an *unreasonable* risk to specific individuals or to society at large. Part IV.C suggests the appropriate method of implementing this solution: an amendment to the Fair Credit Reporting Act.[11]

II. THE DOCTRINE OF NEGLIGENT HIRING

A. *Negligent Hiring Liability: The Public's Need for It and the Employer's Need to Protect Against It*

While negligent retention and supervision liability have been recognized for many years,[12] imposing liability for negligent hiring is a more recent development in American common law.[13] The doctrine of negligent hiring has been rapidly adopted, however, and most states now recognize it as a distinct cause of action.[14] Nevertheless, the difference between negligent retention and supervision and negligent hiring is significant. In negligent retention and supervision cases, for liability to apply, the employer is required to have continued retention of the employee after the employer became aware of his dangerous propensities.[15] However, in negligent hiring cases, the plaintiff generally must prove only that the employer knew or should have known of the employee's dangerous propensities.[16] Employers can also be liable for employees' actions even

10. *See infra* Part IV.B.

11. *See infra* Part IV.C.

12. *See, e.g.*, Trend v. Detroit United Ry., 112 N.W. 977, 977–78 (Mich. 1907) (recognizing a negligent retention cause of action); Laning v. N.Y. Cent. R.R. Co., 49 N.Y. 521, 533–34 (1872) (recognizing a negligent retention cause of action).

13. *See, e.g.*, Malicki v. Doe, 814 So. 2d 347, 361–62 (Fla. 2002). The Florida Supreme Court explains in *Malicki* that "Florida has recognized the viability of the common law cause of action for the negligent supervision of an employee [for] more than forty-five years . . . . [However,] [t]he rule articulated in [the case recognizing a cause of action for negligent supervision] has evolved to encompass the tort of negligent hiring as well as negligent supervision." *Id.*

14. *See* LABOR & EMPLOYMENT: EMPLOYMENT SCREENING, NEGLIGENT HIRING & RETENTION: CASE LAW IMPOSING A DUTY TO INVESTIGATE §10.01 (Matthew Bender & Co. 2008).

15. *Malicki*, 814 So. 2d at 362 n.15.

16. The Florida Supreme Court explained this distinction in detail in *Malicki*. *Id.*

when the actions fall outside the scope of employment,[17] as negligent hiring is not grounded in the traditional principle of respondeat superior.[18]

By extending liability to employers to cases where the employer has no actual knowledge of an employee's dangerous propensities at the time of hiring, and by including liability for employees' actions outside of the scope of employment, courts have undoubtedly left employers uneasy.[19] This extension of liability, however, reflects a number of important public policy considerations. First, and most importantly, courts have recognized that innocent third parties have a right to be protected from an employee's dangerous propensities. As Justice Handler of the New Jersey Supreme Court put it: "[The] wrong . . . redressed [by the doctrine of negligent hiring] is negligence of the employer in the hiring or retention of employees whose qualities unreasonably expose the public to a risk of harm."[20] Justice Handler noted that one "dealing with the public is bound to use reasonable care to select employees competent and fit for the work assigned to them and to refrain from retaining the services of an unfit employee."[21] Second, employers are arguably in the best position to prevent harm caused by employees with dangerous propensities. With the range of background checks available today,[22] there is no reason why employers should not make inquiries into the criminal histories of employees when the type of employment renders such an inquiry appropriate. Finally, courts may—explicitly or implicitly—follow a "deep pockets" theory—where the court chooses to place the costs of a victim's loss in the hands of the entity best capable of bearing it.[23] In most cases,

17. *See, e.g.*, Di Cosala v. Kay, 450 A.2d 508, 515 (N.J. 1982) (citing Fleming v. Bronfin, 80 A.2d 915, 917 (D.C. 1951)) (explaining that the duty of the employer is to exercise reasonable care in hiring to protect the public and thus that "the employer may be liable even though the injury was brought about by the willful act of the employee beyond the scope of his employment").

18. *See id.* at 515 (distinguishing claims brought under a negligent hiring theory from those brought under principles of respondeat superior).

19. Creation of negligent hiring liability has also left some courts uneasy. *See, e.g.*, Pittard v. Four Seasons Motor Inn, Inc., 688 P.2d 333, 340–41 (N.M. Ct. App. 1984) (implying that the employer would have to have actual knowledge of an employee's dangerous propensities to satisfy the foreseeability element necessary to a finding of negligent hiring).

20. Di Cosala v. Kay, 450 A.2d 508, 516 (N.J. 1982).

21. *Id.* at 515 (quoting Fleming v. Bronfin, 80 A.2d 915, 917 (D.C. 1951)).

22. Dozens of background checks are available from one's desktop computer at the mere click of a button. *See, e.g.*, Intelius Homepage, http://www.intelius.com/searchname.php?searchform=background & (last visited Mar. 22, 2009); IntegraScanHomepage,https://www.integrascan.com/?kwmid=213&kmcid=2387649263 &ma tchtype=&gclid=CICpia3Bt5kCFQu-GgodUz 6y7w (last visited Mar. 22, 2009); EmployeeScreen Homepage, http://www.employeescreen .com/ (last visited Mar. 22, 2009).

23. *Cf.* Patterson v. Blair, 172 S.W.3d 361, 364 (Ky. 2005). The court explains that respondeat superior liability is often justified because the individual tortfeasor has insufficient funds to compensate the injured plaintiff. *Id*. However, the employer often has pockets deep enough to satisfy a judgment. *Id*.

this entity will not be the individual tortfeasor, but the large corporate employer[24] who will almost always carry insurance policies providing for at least some protection from negligent hiring jury verdicts.[25]

Generally, the workers' compensation exclusivity rule, which bars any tort against the employer for damages,[26]covers injuries employees incur at work. This rule therefore reduces an employer's chances of liability for negligent hiring where an employee is injured on the job. However, the exclusivity rule does not bar all causes of action. If public policy is served by permitting suit—despite the workers' compensation bar—employers may still be exposed to negligent hiring liability. For example, in *Byrd v. Richardson-Greenshields Securities, Inc.*,[27] a group of female employees alleged that other employees had sexually harassed them.[28] The employees sued for negligent hiring and retention, alleging that the employer's negligent actions in hiring and retaining the accused employees had proximately caused them severe emotional distress.[29] The Florida Supreme Court held that a negligent hiring claim against the plaintiffs' employer was not barred by the exclusivity rule,[30] reasoning that the public policy of preventing workplace sexual harassment was strong enough to override any argument that the plaintiffs' claims for damages should be preempted by workers' compensation legislation.[31]

Negligent hiring cases also carry the possibility of enormous jury verdicts. Because punitive damages[32] and mental anguish damages[33] are

24. *See, e.g.*, Ralph Ranalli, *Cape Writer's Family Sues over Death*, BOSTON GLOBE, May 18, 2005, at B2 (discussing the filing of a $10-million negligent hiring suit against a waste management company after a trash pick-up employee raped and murdered a resident whose home was located on the employee's trash pick-up route).

25. *See, e.g.*, Blyth Valley Insurance, Inc., http://www.blyth-valley.co.uk/blyth-valley-insurance.html (last visited Feb. 24, 2009) (offering "public liability" insurance to businesses in large amounts); Simply Business, http://www.simplybusiness.co.uk/partner/content/index.htm?page_path=/m1/jsp/skins/simplybusiness/content/insurance/index.jsp (last visited Feb. 24, 2009) (offering "public liability" insurance quotes through a variety of different insurance companies such as Finsbury Insurance Group, Groupama, AXA, and Glemham).

26. *See, e.g.*, Whitney L. Elzen, Comment, *Workplace Violence: Vicarious Liability and Negligence Theories as a Two-Fisted Approach to Employer Liability. Is Louisiana Clinging to an Outmoded Theory?*, 62 LA. L. REV. 897, 924–26 (2002) (discussing the workers' compensation rule generally, and mentioning a few widely recognized exceptions, such as sexual harassment claims).

27. 552 So. 2d 1099 (Fla. 1989).

28. *Id.* at 1100.

29. *Id.*

30. *Id.* at 1103–04.

31. *Id.* at 1104.

32. *See* Dabney D. Ware & Bradley R. Johnson, Oncale v. Sundowner Offshore Services, Inc.*: Perverted Behavior Leads to a Perverse Ruling*, 51 FLA. L. REV. 489, 507–08 (1999); *see also* Fay Hansen, *Taking 'Reasonable' Action to Avoid Negligent Hiring Claims*, WORKFORCE MGMT., Dec. 11, 2006, 31, 31 (explaining that there are sometimes no caps on punitive damages in negligent hiring lawsuits—a fact that can lead to potentially devastating jury verdicts); Laura J. Hines, *Due Process Limitations on Punitive Damages: Why* State Farm *Won't Be the Last Word*, 37

available in egregious cases, juries may award huge sums. In fact, one study indicates that—as far back as the early nineties—the average out-of-court settlement in such cases was $500,000, while the average jury verdict reached a cool $3 million.[34]

However, because plaintiffs must prove negligence, employers can generally protect themselves from liability by thoroughly evaluating prospective employees. In such a case, an employer will have acted reasonably—and will thus avoid liability. *Malorney v. B & L Motor Freight*[35] is demonstrative of an employer's ability to avoid liability through thorough comprehensive employee evaluations. In *Malorney*, the defendant, a motor freight company, employed Ed Harbour in the position of "over-the-road driver."[36] Harbour's employment application included questions about driving and criminal histories.[37] Defendant verified Harbour's response to the driving history question but failed to investigate Harbour's negative response to questions about criminal convictions.[38] As it turned out, Harbour had numerous convictions for sex-related crimes and had been arrested the prior year for aggravated sodomy of two teenage hitchhikers.[39] After the defendant hired Harbour, Harbour picked up a seventeen-year-old hitchhiker and "repeatedly raped and assaulted [her], threatened to kill her, and viciously beat her" in the sleeping compartment of his truck.[40] The hitchhiker then brought suit against the Defendant employer for negligent hiring, arguing that it had failed to make a reasonable inquiry into Harbour's background.[41] The court stated that employers have a general duty not to "hir[e] a person the employer knew, or *should have known*, was unfit for the job."[42] However, the court decided—taking into account the circumstances and the type of

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AKRON L. REV. 779, 780–812 (2004) (providing an overview of the purposes, effects, and widespread availability of punitive damages); Benjamin J. Robinson, Comment, *Distilling Minimum Due Process Requirements for Punitive Damage Awards*, 60 FLA. L. REV. 991, 1006 (2008) (discussing the Court's confusing standards for excessive punitive damage awards that violate due process); Patrick Hubbard, *Substantive Due Process Limits on Punitive Damage Awards: "Morals Withouth Technique"?*, 60 FLA. L. REV. 349 (2008).

33. *See, e.g.*, Susan E. McPherson, *Painful Findings: Determining the Availability of Mental Anguish Damages in Alabama*, 67 ALA. LAW. 46, 48 (2006).

34. Steve Kaufer, *Corporate Liability: Sharing the Blame for Workplace Violence*, WORKPLACE VIOLENCE RESEARCH INST., http://www.workviolence.com/articles/corporate_liability.htm (last visited Feb. 26, 2009).

35. 496 N.E.2d 1086 (Ill. App. Ct. 1986).

36. *Id.* at 1087.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 1087–88.

42. *Id.* at 1088 (emphasis added) (citing Easley v. Apollo Detective Agency, Inc., 387 N.E.2d 1241, 1248 (Ill. App. Ct. 1979)).

employment—to mold this general duty into a more specific duty,[43] which was then read to the jury.[44] In *Malorney*, the court phrased Defendant's duty as the "duty to entrust its truck to a competent employee fit to drive an over-the-road truck equipped with a sleeping compartment,"[45] which included "a duty to check into Harbour's background so as to ascertain whether he would be a fit employee."[46] The court strongly suggested that the facts of the case indicated a breach of duty, emphasizing that the truck was equipped with a sleeping compartment, and that "B & L probably knew, or should have known, that truckers are prone to give rides to hitchhikers despite rules against such actions."[47]

Malorney illustrates how an employer's actions likely constituted a breach of the duty to hire competent employees. More importantly though, *Malorney* demonstrates the inquiry that employers can, and often do, engage in to prevent negligent hiring liability. For example, it is virtually certain that the Defendant employer would not have been found liable had it followed up on Harbour's negative responses in the questionnaire and performed a full criminal background check. Had it done so, it would have discovered Harbour's violent sexual offenses, reached the conclusion that he was unfit for employment as a truck driver, and denied him a position.

Thus, in light of courts' adoption of the doctrine of negligent hiring, the potential for enormous damages, the lack of a "scope of employment" limitation on liability, and the lack of protection by workers' compensation laws, employers have strong incentives to make reasonable inquiries into employee fitness to avoid liability for negligent hiring and retention.

B. *Negligent Hiring Liability: An Examination of Liability-Limiting Devices*

To assess the fitness of employees and reduce liability, employers throughout the twentieth century used many tools, including polygraph tests,[48] employee honesty tests,[49] and psychological tests such as employee personality tests.[50] Many employers still use these methods.[51] Recent

43. *See id.* at 1089.

44. *See id.* (remanding the case for a determination of whether the employer's specific duty in this case was violated).

45. *Id.*

46. *Id.*

47. *Id.*

48. *See* MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW 187 (5th ed. 2003) (explaining that "polygraph results are . . . responsible for thousands of employment decisions").

49. *Id.* at 193 ("In 1988, an estimated 3.5-million honesty tests were given to applicants and employees.").

50. William D. Hooker, *Psychological Testing in the Workplace*, 11 OCCUP. MED.: STATE OF THE ART REVS. 699 (1996), *reprinted in* MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW 153, 153 (6th ed. 2007). "Psychological Testing has played a significant role in the workplace for

legislation, however, has decreased the practicality of such practices.[52] Also, many experts have recently called into doubt the effectiveness of these tests.[53] Thus, criminal background checks have become the tool of choice for employers.[54]

1. The Inadequacy of Lie Detector Tests

In 1988, Congress implemented the Employee Polygraph Protection Act[55] (EPPA), which almost entirely prohibits the use of polygraphs in private employment.[56] Although the Act is not applicable to federal, state, or local government employers,[57] there are only two exceptions allowing prospective polygraph testing in the private context. The EPPA authorizes polygraph tests for prospective employees only when they are applying to firms "authorized to manufacture, distribute, or dispense a controlled substance"[58] or when they are applying for positions in armored car, security installation, and security guard service firms.[59] These exceptions do not cover even a small minority of American employers. The EPPA also prohibits the use of other truth testing devices in private employment, such as voice stress analyzers, deceptographs, and psychological stress evaluators,[60] except as noted above. Accordingly, the EPPA substantially limits private employers' use of truth-testing devices to assess fitness for employment, leaving employers to turn to other options, such as criminal background checks.

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more than 50 years. . . . At least 3,000 different tests are sold commercially by at least 450 vendors targeted at the workplace." *Id.*

51. *See supra* note 46 and accompanying text.

52. *See infra* Part II.B.1–2.

53. *See infra* notes 66–67 and accompanying text.

54. *See* NAT'L CONSORTIUM FOR JUSTICE INFO. & STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 1, 31 (2005), http://www.search.org/files/pdf/RNTFCSCJRI.pdf [hereinafter CRIMINAL JUSTICE RECORD INFORMATION REPORT] (explaining that after September 11, 2001, the American employment market has seen an "explosion" in the use of criminal background checks).

55. Employee Protection Polygraph Act of 1988, Pub. L. No. 100-347, 102 Stat. 646 (codified as amended at 29 U.S.C. §§ 2001–2009 (2006)).

56. *See id.* § 2002 (making it unlawful to "discriminate against in any manner, or deny employment or promotion to, or threaten to take any such action against (A) any employee or prospective employee who refuses, declines, or fails to take or submit to any lie detector test, or (B) any employee or prospective employee on the basis of the results of a lie detector test").

57. 29 U.S.C.A. § 2006(a) (2009).

58. *Id.* § 2006(f)(1).

59. *Id.* § 2006(e)(1).

60. *Id.* § 2001(3).

2. The Inadequacy of Other Truth-Detecting and Personality-Predicting Devices

Some truth-testing and personality-predicting methods are not prohibited by the EPPA.[61] For example, the EPPA does not address psychological and personality testing,[62] where employees are given long questionnaires asking a slew of intrusive questions about the employee's personal life and past work experience.[63] Employers use the responses prospective employees give to measure several applicant traits, such as honesty and criminal propensities.[64] Employers then use the results to hire the most "fit" employee (i.e., the one least likely to expose the employer to liability).[65] However, many popular personality tests—such as the Minnesota Multiphasic Personality Inventory (MMPI)[66]—have become the subjects of increasing scrutiny.[67] Because many of these tests were not developed for employment screening, it is questionable whether they serve as effective indicators of future job performance.[68] Also, because of the

61. However, certain states prohibit honesty tests by statute. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 149, § 19B(2) (West 2008). Other states limit their use. *See, e.g.*, R.I. GEN. LAWS §§ 28-6.1-1–28-6.1-4 (2008).

62. Another similar test used by employers—and not prohibited by the EPPA—is handwriting analysis. *See* ROTHSTEIN & LIEBMAN, *supra* note 48, at 204. However, the "scientific validity [of handwriting analysis] is far from established." *Id.*

63. For example, the Minnesota Multiphasic Personality Inventory (MMPI), one of the most widely used psychological tests, includes the following true or false questions:

> 12. My sex life is satisfactory.
> 20. I am very seldom troubled by constipation.
> 121. I have never indulged in any unusual sexual practices.
> 142. I have never had a fit or convulsion.
> 189. I like to flirt.
> 209. I like to talk about sex.
> 246. I believe my sins are unpardonable.
> 270. It does not bother me particularly to see animals suffer. . . .
> 379. I got many beatings when I was a child.

Id.

64. *See* Susan J. Stabile, *The Use of Personality Tests as a Hiring Tool: Is the Benefit Worth the Cost?*, 4 U. PA. J. LAB. & EMP. L. 279, 279–80 (2002) (explaining that these tests are used primarily to "weed out" candidates evincing undesirable traits).

65. *See, e.g.*, *id.* at 282 (arguing that "the fear of legal liability for negligent hiring . . . causes employers to undertake screening designed to identify emotional disorders or to predict whether a job applicant has a tendency towards violence or other harassing behavior").

66. *See id.* at 285–86.

67. *See id.* at 312–13 (arguing that personality tests often "do not do what they are supposed to do, discriminate against certain job applicants, and invade the privacy of all applicants").

68. *See id.* at 293 (arguing that because "job performance is 'situationally specific,' that is, an employee's environment plays a significant role in influencing the employee's behavior," it would be illogical to assume that tests developed for other purposes would also be predictive in a work environment); *see also* Dennis P. Saccuzzo, *Still Crazy After All These Years: California's*

intrusive nature of the questions asked, some courts have found the tests, or at least certain provisions within them, to violate the right to privacy found in state constitutions.[69] Additionally, some courts have found that certain tests violate Title VII of the Civil Rights Act of 1964.[70]

Thus, while personality and psychological testing are not generally prohibited by state or federal governments, they offer questionable effectiveness and may expose employers to legal liability. Accordingly, criminal background checks may provide employers with an easier, more efficient, and more cost-effective way to screen job applicants.

3. The Inadequacy of References

Employers may also attempt to limit their negligent hiring liability by seeking references from past employers and other parties. Employers can ask about the employee's character, ability to perform the job, any reprimands received, and any other questions fleshing out an applicant's fitness for employment.[71] However, reference checks will often fail to provide employers with adequate information.[72] In fact, past employers are often reluctant to reveal more than dates of employment,[73] given the possibility of defamation liability[74] or liability under other tort[75] and

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Persistent Use of the MMPI as Character Evidence in Criminal Cases, 33 U.S.F. L. REV. 379, 392 (1999) (arguing that, because "[t]he MMPI was designed to evaluate emotional conditions such as schizophrenia and depression," it is "of questionable validity when used to make assertions about criminal profiles" (internal citations omitted)).

69. *See, e.g.*, Soroka v. Dayton Hudson Corp., 1 Cal. Rptr. 2d 77, 79, 85–87 (Ct. App. 1991) (concluding that personality tests given to applicants for security guard positions at Target Stores could only be justified under the California Constitution if the employer could show that the questions had a strong nexus to the fitness of an applicant for the job in question).

70. *See* Stabile, *supra* note 64, at 303–08 (explaining that personality tests can disadvantage certain classes of people, while acknowledging that establishing a Title VII disparate impact claim in the personality testing context would be difficult, but not impossible); *cf.* Melendez v. Ill. Bell Tel. Co., 79 F.3d 661, 667–72 (7th Cir. 1996) (affirming the trial court's findings that the BSAT, a standardized management test, caused a disparate impact on Hispanics in violation of Title VII).

71. *See, e.g.*, Allison & Taylor, Inc., Sample Reference, https://www.allisontaylor.com/wsj2/prosample.html (last visited Feb. 26, 2009). Allison & Taylor Inc., is a professional reference checking company. *Id.*

72. *See* Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform*, 13 YALE L. & POL'Y REV. 45, 47 (1995) (explaining the results of a survey wherein "only 38 percent of large firms have experienced . . . openness" in requests made to obtain employee information from past employers").

73. *See id.* at 46–47. The Chief Executive Officer of Robert Half International, Inc. said: "Our litigious society is increasingly forcing former employers into taking a position of 'no comment' beyond verification of employment dates and salary." *Id.* (quoting Press Release, Robert Half International, Inc., Survey Shows Employers Find It Harder to Check References (Jan. 1993)).

74. *See, e.g.*, *id.* at 69 (explaining that "[t]he most important aspect of the legal framework governing employment references" is the concern of defamation liability). For a discussion of defamation liability in the reference context, see Valerie L. Acoff, Note, *References Available on Request . . . Not!—Employers Are Being Sued for Providing Employee Job References*, 17 AM. J.

contract[76] theories. Employers are afraid that if they make specific statements about employees' work performance, angry workers who feel "wronged" will sue for defamation.[77] Although truth is a defense to defamation,[78] and although many states provide statutory immunity to defamation claims based on employer references in the form of a qualified privilege,[79] many employers nevertheless follow the advice of their attorneys and shy away from providing more than past employment dates and salary.[80] Needless to say, such sparse references will not provide much of a buffer for an employer seeking to avoid negligent hiring liability. Thus, references will often be inadequate because their use, without more, will not constitute a reasonable inquiry into the fitness of an employee.

4. The Effectiveness of Criminal Background Checks

Given these inadequacies, it is no wonder criminal background checking agencies have seen a boom in business.[81] Taking advantage of the Internet age,[82] employers are ordering criminal background checks in

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TRIAL ADVOC. 755, 755–71 (1994); Deborah Daniloff, Note, *Employer Defamation: Reasons and Remedies for Declining References and Chilled Communications in the Workplace*, 40 HASTINGS L. J. 687, 688–89 (1989).

75. *See, e.g.*, Saxton, *supra* note 72, at 64 (listing other possible theories of employer tort liability in the employee reference context as "intentional interference with prospective economic advantage, and the complementary doctrines of nondisclosure and misrepresentation").

76. *See, e.g.*, *id.* at 62.

77. *See, e.g.*, Chambers v. Am. Trans Air, Inc., 577 N.E.2d 612, 616–17 (Ind. Ct. App. 1991). In *Chambers*, a former ATA employee had her mother and boyfriend call ATA and pose as a prospective employer. *Id.* at 614. Apparently, Chambers did this because of a strained relationship with supervisors and because of Chambers' belief that these supervisors were out to get her. *Id.* at 616. When, during these phone calls, ATA made several comments about Chambers' personality and abilities that Chambers believed were not "an honest evaluation of [her] work performance," Chambers brought suit against ATA for defamation. *Id.* at 614, 617.

78. RESTATEMENT (SECOND) OF TORTS § 581A (1977) (stating the general rule that "[o]ne who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true").

79. *Chambers*, 577 N.E.2d at 615 (stating the general rule: "As a general rule an employee reference given by a former employer to a prospective employer is clothed with the mantle of a qualified privilege"); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 115, at 827 (5th ed. 1984).

80. *See* ROTHSTEIN & LIEBMAN, *supra* note 48, at 166. "According to a 1999 survey conducted by the Society of Human Resource Management, only 19 percent of 854 respondents would give a reference-seeker a reason why any employee had left. . . ." *Id.* However, in a study of nationwide court records from "1965 to 1970 and 1985 to 1990, the authors identified only 16 defamation cases arising from reference checks, and plaintiffs prevailed in only four cases." *Id.* Studies like these lead only to the conclusion that past employers are taking a "better safe than sorry" approach. *See also* Saxton, *supra* note 72, at 47.

81. *See* CRIMINAL JUSTICE RECORD INFORMATION REPORT, *supra* note 54, at 1, 31.

82. "Criminal justice information can be ordered from home or office with a few lines of data entry and a few clicks of the mouse." *Id.* at 29.

record numbers, even for menial positions.[83] Lower costs[84] and easier access[85] provide yet another hidden incentive to perform these checks, potentially leaving those employers who choose not to conduct such checks in a difficult position when trying to prove they were not negligent in hiring.[86] Thus, common sense would suggest that—at least for sensitive positions involving public safety—criminal background checks should be *required* to protect the public, the employer, and other employees who may be exposed to a potentially dangerous worker.

State legislatures—apparently recognizing the utility of this argument—have begun to make "background screening" mandatory for certain jobs.[87] Florida, for example, imposes compulsory background screening for positions "designated by law as positions of trust or responsibility,"[88] along with other positions implicating public safety concerns. Public school teachers,[89] school health services personnel,[90] child-care workers,[91] mortgage brokers,[92] nursing home employees,[93] and contractors who install fire alarms or burglar alarms[94] are among the positions requiring background screening under the Florida regime. The steps under Florida's system are as follows: First, an employer must determine whether the statutory scheme requires a background check for the job.[95] Next, the employer must conduct whatever level of screening is required by the statute.[96] Finally, if employee screening reveals a criminal history, the employer must determine the consequences. Employment may be prohibited for certain positions, for example, if the applicant has been

83. *See* Daniel J. Solove & Chris Jay Hoofnagle, *A Model Regime of Privacy Protection*, 2006 U. ILL. L. REV. 357, 375 (explaining that, because criminal "[b]ackground checks are cheaper now than ever before . . . individuals are being screened for even menial jobs").

84. *See generally* CRIMINAL JUSTICE RECORD INFORMATION REPORT, *supra* note 54.

85. *See id.*

86. The minimal costs associated with the use of background checks, along with the widespread use of background checks by other employers, will at least diminish the non-using employer's argument. *See, e.g.*, Malorney v. B & L Motor Freight, Inc., 496 N.E.2d 1086, 1089 (Ill. App. Ct. 1986) (explaining that "there is no evidence in the record to justify the contention that the cost of checking on the criminal history of all truck driver applicants is too expensive and burdensome when measured against the potential utility of doing so").

87. Florida breaks down required background screening into Level 1 and Level 2 screening and provides different requirements for both. *See* FLA. STAT. ANN. §§ 435.03, 435.04 (West 2008).

88. *See id.* § 435.04(1).

89. *Id.* § 1012.32.

90. *Id.* § 381.0059.

91. *Id.* § 402.305.

92. *Id.* § 494.0033.

93. *Id.* § 400.215.

94. *Id.* §§ 489.518, .5185.

95. *See supra* note 87 and accompanying text.

96. *See supra* notes 87–94 and accompanying text.

convicted of specific crimes, such as those "relating to murder,"[97] or those "involving moral turpitude."[98] For instance, Florida law requires that school teachers submit to screening, and, if such screening reveals that they were convicted of a crime involving moral turpitude, they cannot be hired into any position that requires direct contact with students.[99]

Although most positions are still not covered by mandatory screening laws,[100] it is likely that such laws will nonetheless encourage employers to engage in criminal background checks. It is also likely that state legislatures will require background screening for even more jobs in the near future.[101]

III. THE PARADOX OF THE CRIMINAL RECORD REVOLUTION

A. *The Impact of the Criminal Record Revolution on an Ex-Offender's Employment Opportunities*

Employers' increased need for and use of criminal records in employment decisions has spurred a "Criminal Records Revolution." As a result, criminal convictions have collateral consequences that reach far beyond imprisonment.[102] The conviction for a criminal offense (or even the mere accusation) carries a stigma with it that can now act as a barrier to successful re-entry into society.[103] Many employers may refuse to hire an otherwise eligible candidate on the grounds that a criminal conviction, or even a criminal charge, reflects a lack of moral character.[104] Additionally, many employers will refuse employment out of fear that the employee will expose the employer to negligent hiring or retention liability.[105]

Thus, without laws that at least limit an employer's rights to make adverse employment decisions based on an individual's ex-offender status, the cycle of recidivism, already all too present in contemporary society,

97. FLA. STAT. § 435.04(2)(d).

98. *See id.* § 1012.32(2)(d).

99. *See id.*

100. *See generally supra* notes 87–99.

101. This inference is the natural one to make from legislatures' recent addition of multiple provisions, all requiring some sort of background screening for certain positions. In other words, the trend is toward requiring screening for more positions. *See, e.g.*, *supra* notes 95–102.

102. *See, e.g.*, Walter Matthews Grant et al., Note, Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1002 (1970).

103. *See infra* note 105 and accompanying text.

104. *See, e.g.*, Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1298 (8th Cir. 1975) (discussing an employer's allegations that a criminal record should constitute justification for a racially discriminatory practice, given convicted persons' alleged lack of moral character); *see also infra* note 105.

105. *See, e.g.*, Rasmusen, *supra* note 6, at 519–21 (explaining that one of the consequences of the social stigmatization of a criminal conviction is a decrease in interaction with the stigmatized individual, which in turn leads to a decrease in that person's wages and job opportunities).

may intensify. If convicted criminals cannot find employment, both common sense and expert opinion suggest they are more likely to end up back in prison.[106] Statistics illustrate the severity of the recidivism problem. Out "[o]f the 272,111 persons released from prisons in 15 States in 1994, an estimated 67.5% were rearrested for a felony or serious misdemeanor within 3 years, 46.9% were reconvicted, and 25.4% resentenced to prison for a new crime."[107] Moreover, American prisons are already filling at an alarming rate.[108] As of December 31, 2001, an estimated 5.6 million American adults had served time in prison at one point in their lives.[109] If these rates remain unchanged, one in fifteen people will serve part of their lives behind bars.[110] In light of these facts, taking steps to ensure that meaningful employment opportunities remain available to ex-offenders would be more than prudent for American society.

B. *Protections Available to Ex-Offender Employees*

1. Federal Statutory Protections

i. Title VII

Title VII of the Civil Rights Act of 1964[111] prohibits public and private employers from engaging in practices that are overtly discriminatory, or that lead to a "disparate impact"[112] on certain protected groups. The groups protected by Title VII are race, color, religion, sex, and national origin.[113] However, Title VII by its own terms does not protect ex-offenders.[114]

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106. However, there is the argument that, because our prison system does not effectively serve its purported rehabilitative ends, most ex-convicts are not fit for employment. *See, e.g.*, CRIMINAL JUSTICE RECORD INFORMATION REPORT, *supra* note 54, at 82 (reasoning that "one of the reasons that reintegration and public safety goals conflict is the lack of confidence in society's ability to rehabilitate offenders."). This argument presents complicated issues beyond the scope of this Note.

107. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *supra* note 8.

108. This rate is especially alarming when compared to other countries. *See supra* note 8.

109. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *supra* note 8. The rate of incarceration is even higher for African Americans; African-American males in particular. *Id.*

110. *See id.*

111. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 700–708, 710–716, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e–2000e17 (2006)).

112. These practices are not discriminatory on their face, but discriminatory in effect. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430–34 (1971).

113. 42 U.S.C. § 2000e-2(a).

114. *See id.* Some commentators have suggested, as a solution to the problem discussed in this Note, the possibility of adding ex-convicts to the list of protected classes under Title VII or similar state statutes. For a discussion of this topic, *see* Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. SOC'Y 18, 18–38 (2005) (examining in general the status of ex-convicts as a protected class under Title VII).

Nonetheless, while ex-offenders are not explicitly protected, employers may still occasionally violate Title VII by refusing to employ applicants with criminal histories.[115] To plead a prima facie cause of disparate impact employment discrimination under Title VII, an individual must show that the employer engaged in a facially neutral policy that had the effect of disadvantaging a protected class.[116] The employer then receives the opportunity to present evidence showing that such a policy is "consistent with business necessity."[117] Moreover, a plaintiff can prove disparate impact with statistics.[118] Thus, it is conceivable that Title VII could provide protection to employees denied employment on the basis of criminal history if the employee could prove that the policy of denying employment to ex-offenders had the practical effect of denying employment to a disproportionately large number of people belonging to a protected class. Given the large amount of incarcerated African-American males,[119] the possibility of disparate impact race cases in the criminal history context seems a distinct possibility.[120] In fact, in *Gregory v. Litton Systems, Inc.*,[121] the Eight Circuit found that a facially neutral practice of inquiring into employees' criminal histories presented a legitimate Title VII race case.[122]

However, any protection Title VII provides to ex-offenders is insufficient, for a number of reasons. First, protection is only available to

115. *See infra* note 122 and accompanying text.

116. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i); *Griggs*, 401 U.S. at 430–34 ("[P]ractices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."); *see also* Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 815 (2004) (explaining that a disparate impact claim is one "in which plaintiffs allege that an employer's facially neutral policies have a discriminatory effect on a protected group and the employer cannot justify the policies by business necessity").

117. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i).

118. *See* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 337–40 (1977) (approving the use of statistics to prove discrimination in a disparate impact case); *see also* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 (1977) (narrowing the application of statistical data to the "relevant labor market" when statistics are used to demonstrate employment discrimination).

119. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *supra* note 8 (explaining that both the lifetime chances of going to prison, and the current incarceration rates, are significantly higher for African Americans, especially African-American males).

120. The argument would be as follows: Given the disproportionately large number of African Americans with criminal records, an employment policy denying employment to those with criminal histories would produce a workforce with a characteristic disparity between the number of African-American workers employed in that particular job, and the number of African-American workers employed in the relevant labor market where such a policy was not utilized.

121. 472 F.2d 631 (9th Cir. 1972).

122. *Id.* at 632 (finding a violation of Title VII where a facially neutral practice of inquiring into arrest records operated as a bar to employment for a far greater proportion of African-American applicants when compared to other applicants, and where the employer failed to demonstrate reasonable business purposes for the continued inquiry into arrest records).

those ex-offenders who happen to fall into one of the five protected groups.[123] Second, employees in small workplaces will almost always receive minimal protection under Title VII because discriminatory practices in small workplaces will often produce no statistical disparity, even though the same practices may do so in a larger workplace.[124] And finally, bringing a disparate impact case provides only retroactive relief,[125] and thus by the time a court issues its decision, the adverse employment decision has already been made.

ii. ADA

Like Title VII, the Americans with Disabilities Act[126] provides only indirect protection to ex-offender employees. The ADA prohibits private and state employers[127] from discriminating[128] against a prospective employee on the basis of a disability, provided that the employee qualifies under the act.[129] In order to qualify, a prospective employee must have, or must be regarded by the employer as having, "a physical or mental impairment that substantially limits one or more of [his] major life activities,"[130] and must be able "with or without reasonable accommodation, [to] perform the essential functions of the employment position that such individual holds or desires."[131] Thus, the ADA's very definitions have been criticized by commentators for shrinking the class of protected individuals to a miniscule size;[132] if one is able to show that he is "disabled" under the ADA, it is unlikely that he will be able to perform the essential functions of the position. The chances of relief under the ADA are

123. If the employer's facially neutral policy does not disadvantage a prospective employee because of her race, color, sex, religion, or national origin, Title VII provides the individual no remedy. *See* 42 U.S.C. § 2000e-2(a)(1) (2006).

124. *See, e.g.*, Watkins v. City of Chicago, 73 F. Supp. 2d 944, 949 (N.D. Ill. 1999) (holding that evidence of a greater number of arrests in the nationwide African-American community is not evidence of a disparate impact in a specific workplace).

125. *See* 42 U.S.C. § 2000e-5(g).

126. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.).

127. *See* 42 U.S.C.A. § 12111(5) (2009). However, the protections of the ADA do not apply to federal employers or employers with less than 15 employees. *Id.*

128. "Discriminating" includes refusing to hire a prospective employee. *Id.* § 12112(a).

129. *See id.*

130. *See id.* § 12102(2). Disability can also mean having "a record of such an impairment" even though the prospective employee does not currently suffer from the impairment. *Id.*

131. *Id.* § 12111(8).

132. *See, e.g.*, Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 108–09 (1997) (arguing that the definitions in the ADA have "become increasingly narrowed to the point where [the ADA] is in danger of becoming ineffective"); Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 275–76 (2000).

further lessened because the ex-offender must show that the crime for which he was denied employment was somehow brought on by a "disability."[133] Because establishing a cause of action under the ADA would be difficult for an ex-offender, the ADA's usefulness is even more limited than Title VII's.[134]

2. State Statutory Protections

i. State Civil Rights Acts

Protections similar to those available under Title VII and the ADA are generally available under state civil rights acts as well—and some states add in a few other protected categories.[135] For example, Florida's Civil Rights Act provides all the standard protections available under Title VII, but also prohibits adverse employment decisions based on marital status,[136] age,[137] and handicap.[138] However, no state civil rights act labels past criminal offenders as a protected class.[139] Thus, state civil rights legislation largely fails to provide extra protection to employees seeking to avoid adverse employment decisions based on ex-offender status.[140]

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133. Although the prospect of an ex-offender obtaining relief under the ADA is bleak, the possibility is at least worth mentioning. One could imagine the situation where an employee was fired or refused employment because his past criminal history showed a pattern of instability. If that employee could have performed the essential functions of the job with or without reasonable accommodation, she may have a cause of action under the ADA. *See, e.g.*, James R. Todd, Comment, *"It's Not My Problem": How Workplace Violence and Potential Employer Liability Lead to Employment Discrimination of Ex-Convicts*, 36 ARIZ. ST. L.J. 725, 741 (2004).

134. *See, e.g.*, Stefan, *supra* note 132, at 275–76 (explaining that, while courts are not inclined to find disability in the first place, this difficulty "is even more pronounced in the case of people with psychiatric disabilities").

135. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1463 (2008) (including genetic information); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2008) (including sexual orientation); N.J. STAT. ANN. § 10:5–12 (West 2008) (including civil union status, domestic partnership status, sexual orientation, genetic information, gender identity or expression, and disability or atypical hereditary cellular or blood trait of any individual, among others). In addition to adding protected categories, most state laws do not exempt small employers. *See* ROTHSTEIN & LIEBMAN, *supra* note 48, at 265.

136. *See, e.g.*, FLA. STAT. ANN. § 760.10(1)(a) (West 2008).

137. *Id.*

138. *Id.* Recall that there is also federal protection available for age and disability discrimination; although this protection is provided in statutes separate from the Federal Civil Rights Act of 1964 and requires an analysis different from traditional Title VII discrimination cases. *See also* 29 U.S.C.A. §§ 621–634 (2009) (prohibiting certain types of age discrimination).

139. However, some scholars have suggested that ex-offender employees *should* be labeled a protected class. *See, e.g.*, Aukerman, *supra* note 114, at 18–19.

140. However, state laws may still protect ex-offenders in the same manner as federal laws such as Title VII. If an ex-offender can show that a facially neutral policy produces a disparate impact on a protected class, he may have a cause of action under a state civil rights statute. In this sense state laws are more helpful because they may protect more classes than Title VII.

ii. Record Expunging and Record Sealing

Record expungement and record sealing are two options[141] that prevent an employer from finding out about an employee's criminal history.[142] However, neither record sealing nor expungement provide adequate protection to ex-offender employees.

First, a few states do not provide for record expunging or record sealing at all.[143] Second, although most states do allow for expungement or sealing of juvenile records, many do not do so for adult offenses, especially those offenses that are serious.[144] For example, generally neither sealing nor expungement is available for convictions for certain violent offenses, sexual offenses, or DUIs.[145] Other limitations in some states, such as limits on the amount of expungements an individual may bring within a specified period of time,[146] may further diminish the usefulness of these procedures.

Additionally, although "expungment" provides for the actual physical destruction of a record,[147] some states allow only "sealing,"[148] a procedure that generally makes a record inaccessible to those without a legal right to access it.[149] In these states, even if an employee is successful at having his criminal record sealed, certain employers may still be able to access the sealed records.[150] Finally, and perhaps most importantly, record sealing and expungement are inadequate devices to serve the competing public policies at issue in this Note because they ignore the public's need to be protected against dangerous employees.[151]

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141. The procedures for obtaining these remedies, along with the availability of remedies differ from state to state. *Compare* FLA. STAT. §§ 943.045, .059 *with* CAL. PENAL CODE § 851.8 (West 2008).

142. The employee must take affirmative steps, generally by applying to the court for expungement. *See, e.g.*, FLA. STAT. § 943.059 (requiring a number of steps by the ex-offender applicant to seal a record).

143. *See* Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URB. L.J. 1501, 1509–10 (2003).

144. *Id.*

145. *See, e.g.*, FLA. STAT. § 943.059(2)(c).

146. *See, e.g.*, *id.* § 943.0585(1)(b)(3).

147. *See id.* § 943.045(13).

148. *See, e.g.*, MINN. STAT. ANN. § 609A.01 (West 2008). Minnesota's statute mistakenly uses the word "expunge" to describe what is actually "sealing," as it actually mandates the preservation of the "expunged" records, instead of providing for their destruction. *See id.*

149. *See* FLA. STAT. § 943.059.

150. *See, e.g.*, *id*. § 943.059(4).

151. If employers cannot discover information about the employee's criminal history, they will be ill-equipped to research which employees are or are not fit for employment. One solution would be a law that codifies all situations in which an employee is fit for employment, and allows for expungement accordingly. This Note does not adopt this approach, which is beyond its scope.

iii. State Statutes Addressing the Use of Criminal Records in Employment Decisions

The most important protections available to ex-offender employees come in the form of state statutes specifically regulating employers' rights to use criminal histories in employment decisions. In these statutes, the majority of states allow all employers—both public and private—to rely on arrest records in making employment decisions, even when the arrests did not lead to conviction,[152] while a minority of states prohibit all employers from relying on arrest records that do *not* lead to conviction.[153]

Three states go even further—prohibiting *public* employers from considering *any* arrests[154] in making employment decisions. However, all three of these states still allow private employers to make decisions based on arrests that did not lead to conviction.[155]

Still other states provide ex-offender employees protection via a third, middle approach, by adopting "standards" that result in varying degrees of regulation. For example, Kansas allows employers to inquire into an employee's criminal history only after obtaining a release from the employee and only for the purpose of determining that employee's fitness for employment.[156] However, of the fourteen states that adopt similar standards,[157] only five have adopted standards that are applicable to private employers.[158]

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152. *See* Mukamal & Samuels, *supra* note 143, at 1503–04.

153. *See, e.g.*, CAL. LAB. CODE § 432.7(f)(1) (West 2008); HAW. REV. STAT. §§ 378-2(1)(A), 831-3.2(e) (LexisNexis 2008); MICH. COMP. LAWS ANN. § 37.2205a(1) (West 2008); N.Y. EXEC. LAW § 296.16 (McKinney 2008); OHIO REV. CODE ANN. § 2953.55(A) (West 2008); R.I. GEN. LAWS § 28-5-6(7) (2008); UTAH ADMIN. CODE r. 606-2-2(U), (V) (1994); WIS. STAT. ANN. §§ 111.325, .335(1)(a)–(b) (West 2007).

154. *See* ARK. CODE ANN. § 17-1-103(a)–(c) (2008); N.H. REV. STAT. ANN. § 21-I:51 (2008); N.M. STAT. ANN. § 28-2-2 (West 2008).

155. *See* Mukamal & Samuels, *supra* note 143, at 1504.

156. *See* KAN. STAT. ANN. § 22-4710(a), (c) (2008).

157. *See* ARIZ. REV. STAT. ANN. § 13-904(E) (2008); COLO. REV. STAT. ANN. § 24-5-101 (West 2008); CONN. GEN. STAT. ANN. §§ 31-51i, 46a-80(d) (West 2008); FLA. STAT. ANN. § 775.16 (West 2008); HAW. REV. STAT. § 378-2.5; KAN. STAT. ANN. § 22-4710(f); KY. REV. STAT. ANN. § 335B.020 (West 2008); LA. REV. STAT. ANN. § 37:2950 (2008); MINN. STAT. ANN. § 364.03 (West 2008); N.M. STAT. ANN. § 28-2-3(b)(2); N.Y. CORRECT. LAW §§ 750–54 (McKinney 2008); 18 PA. CONS. STAT. ANN. §§ 9124(d), 9125(b)–(c) (West 2008); WASH. REV. CODE ANN. §§ 9.96A.020, 9.96A.060, 9.96A.030 (West 2008); WIS. STAT. ANN . § 111.325 (West 2007).

158. *See* HAW. REV. STAT. § 378-2.5; KAN. STAT. ANN. 22-4710(f); N.Y. CORRECT. LAW §§ 750–54; 18 PA. CONS. STAT. ANN. § 9125(b); WIS. STAT. ANN. §§ 111.325, .335(1)(c).

IV. A SUGGESTION FOR A NATIONAL SOLUTION: BALANCING COMPETING INTERESTS

A. *The Need for a National Solution*

Given the increased reliance on criminal records in hiring, ex-offenders in most states receive inadequate protection under current law. While federal law may minimally protect ex-offenders, most meaningful protections derive from state law that differs drastically from state to state. These differences are problematic. With the advent of the global workplace,[159] employers and employees need to know what actions employers can and cannot take based on criminal background checks. With many companies expanding offices interstate, it will become difficult, if not impossible, for employers to adopt company-wide policies on the appropriate uses of ex-offender status in a system in which the laws of each state differ.[160]

Consider the following example: A small private house-alarm company, *Acme*, is contemplating expanding into new markets and wants to hire new employees for alarm installation positions in various states. *Acme* desires to develop a company-wide hiring policy to ensure the hiring of safe and competent alarm installers who will not expose the company to negligent hiring liability. *Acme* is faced with a dilemma: In some states the law actually prohibits employers from hiring ex-convicts as an alarm installer,[161] while in some other states *Acme* may actually be prohibited from *not* hiring the employee based on his criminal records.[162] This places *Acme* in a precarious position: it may, after a long and expensive process, adopt differing policies in different states. However, this approach would result in even less certainty for prospective employees targeting certain companies. Alternatively, *Acme* may form a national policy without realizing its implications, and subject itself to negligent hiring liability under differing state laws. These kinds of choices, in the aggregate, may deter the interstate expansion of business.[163]

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159. *See* Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 403–04, 422 (1995) (arguing that the developing global economy will have serious implications for employment law).

160. *See* Stephen J. Beaver, Comment, *Beyond the Exclusivity Rule: Employee's Liability for Workplace Violence*, 81 MARQ. L. REV. 103, 131 (1997) (explaining that "employee protections afforded under current legislative schemes such as Title VII and the ADA make it difficult for employers to take proactive steps to ensure the safety of their employees and others").

161. This is the case in Florida. *See* FLA. STAT. ANN. §§ 489.518, .5185 (West 2008).

162. *See, e.g.*, KAN. STAT. ANN. § 22-4710(a) (2008) (stating that an employer may not inspect a criminal record of an employee or prospective employee for purposes of qualification for employment).

163. For example, a small business such as *Acme* may incur such large attorney fees in ascertaining the differences between state laws that it will decide that the transaction costs of

Having seen the need for a national solution governing the use of criminal records and ex-offender status that properly balances the interests of the public, the employer, and the ex-offender employee, this Note now turns to the proper parameters of such a solution.

B. *A National Solution: The New York Model*

It is prudent to first note what could *not* serve as an adequate national solution. The majority of states—which allow all employers (both public and private) to base employment decisions on records of even those arrests that *did not lead to conviction*[164]—follow the least desirable approach. In these states, employers may make an employment decision adverse to an employee or prospective employee just because he was charged with a crime—even if he was exonerated. These states give employers carte blanche to discriminate against qualified individuals whose criminal histories neither impair their ability to successfully perform their job nor pose any risk to co-workers, employers, or society. This approach needlessly frustrates ex-offenders' abilities to successfully re-enter society.[165]

The approach of the minority of states, which prohibits all employers from relying on arrest records that do not lead to conviction,[166] is also inadequate. Even assuming these statutory schemes improve upon the majority approach, it is still flawed because it provides ex-*convicts* with no protection.[167]

The third approach, adopted by three states, strongly cautions *public* employers against considering *any* arrests[168] when making employment decisions. This approach is also inadequate, as all three of these states still

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expanding interstate outweigh the benefits.

164. *See* Mukamal & Samuels, *supra* note 143, at 1503–04.

165. *See, e.g.*, Peluso v. Smith, 540 N.Y.S.2d 631, 634 (App. Div. 1989) (arguing that prejudice against ex-offenders, according to research, "was not only widespread but unfair and counterproductive . . . [and] [w]hile offenders were encouraged upon release from prison as part of their rehabilitation to find employment, their criminal records caused great difficulty though there was no connection between the job or license and the crime committed, its circumstances or the offender's background"); *see also infra* note 167 and accompanying text.

166. CAL. LAB. CODE § 432.7(f)(1) (West 2008); HAW. REV. STAT. §§ 378-2(1)(A), 831-3.2(e) (LexisNexis 2008); MICH. COMP. LAWS ANN. § 37.2205a(1) (West 2008); N.Y. EXEC. LAW § 296.16 (McKinney 2008); OHIO REV. CODE ANN. § 2953.55(A) (West 2008); R.I. GEN. LAWS §§ 28-5-6(7), -7(7) (2008); UTAH ADMIN. CODE r. 606-2-2(U), (V) (1994); WIS. STAT. ANN. §§ 111.325, .335(1)(a)–(b) (2007).

167. Just because someone is convicted of a crime does not mean that they pose an increased threat to society or to their employer. For example, if someone was convicted of marijuana possession ten years ago, it would hardly be fair to say that hiring that employee in a janitorial capacity would pose more risks than hiring someone who was not convicted of such a crime.

168. ARK. CODE ANN. § 17-1-103(a)–(c) (2008); N.H. REV. STAT. ANN. § 21-I:51 (2008); N.M. STAT. ANN. § 28-2-2 (West 2008).

allow *private* employers to make hiring decisions on the basis of arrests that lead to conviction.[169] Even if extended to private employers, such a hard-line stance could leave the public and employers in a precarious position, as criminal records give employers a powerful tool to prevent the hiring of incompetent dangerous employees. Additionally, because of the widely differing state approaches to negligent hiring,[170] any national approach advocating a complete bar to the use of criminal records in employment decisions could actually aggravate the problems that it seeks to solve—given that employers in one state may then be subject to liability for negligent hiring on the same set of facts for which employers in another state are not.[171] Until there is more uniformity among states, the only workable approach is one that gives employers at least some discretion in their use of criminal records. Such a method ensures that employers are able to navigate around the negligent hiring laws of their state.

Furthermore, any approach that regulates the use of criminal records in employment decisions, but applies only to public employers, is an inadequate solution. In view of the fact that the private sector employs significantly more Americans than the public sector,[172] the problems of U.S. recidivism, and the willingness of Congress to pre-empt the field in other areas to fix similar social problems,[173] there seems to be no convincing argument for extending protection to the public sector and not the private.[174]

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169. *See* Mukamal & Samuels, *supra* note 143, at 1504.

170. *See generally* Pruitt v. Pavelin, 685 P.2d 1347 (Ariz. Ct. App. 1984) (discussing foreseeability as the primary inquiry); Robinson v. Smith, 27 Cal. Rptr. 536 (Cal. Ct. App. 1963) (focusing on the difference between ministerial and discretionary duties of the employee when deciding employer's liability); Colwell v. Oatman, 510 P.2d 464 (Colo. Ct. App. 1973) (stating that an employer must exercise the care of a reasonably prudent person in selecting employees); Williams v. Feather Sound, Inc., 386 So. 2d 1238 (Fla. 2d DCA 1980) (focusing on the type of employment when analyzing the employer's responsibility to check employee's background); Cherry v. Kelly Servs., Inc., 319 S.E.2d 463 (Ga. Ct. App. 1984) (applying the standard of whether the employer knew, or in the exercise of ordinary care should have known).

171. Inconsistent state legislation often produces inconsistent results.

172. *See* Stephen Hicks & Craig Lindsay, *Public Sector Employment*, LABOUR MKT. TRENDS, Apr. 2005, 139, 145 (analyzing the latest available estimates for public and private sector employment for the period from June 1991 to March 2004 and finding that the private sector is far larger than the public sector).

173. *See* ROTHSTEIN & LIEBMAN, *supra* note 48, at 256 (explaining that in enacting Title VII and applying it to both public and private employers, Congress was concerned about "eliminating not only specific instances of employment discrimination, but its broader economic and social effects as well"); *see also* Jeffrey M. McFarland, Comment, *Constitutional Law: Penalty Enhancements for Bigoted Beliefs:* Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993), 45 FLA. L. REV. 743, 752 (1993) (concluding that the congressional purpose for Title VII was to remedy the consequences of employment discrimination, not the motivations behind it).

174. The only plausible argument seems to be the federal government's desire to avoid an assault on state sovereignty. However, this argument holds little weight when we examine the factors listed *infra*.

The New York Legislature has adopted a much more fair and practical approach. New York's approach can be split into two categories—one that specifically deals with the appropriate use of criminal conviction information[175]—and one that addresses the appropriate use of criminal charges and allegations that never resulted in a conviction.[176]

First, New York explicitly prohibits adverse employment decisions made on the basis of ex-offender status where the employee has not been convicted of a crime.[177] This approach is sensible, given that the entire purpose of the justice system is to determine guilt. Therefore, when an employee has been exonerated, he should not be subjected to further penalties by being denied employment.[178] On the contrary, when the system has determined that an individual is not guilty of a crime, employers should be barred from considering the charges in making adverse employment decisions, as there is no longer any societal need to "tag" the individual as dangerous.

Second, New York law makes it an unlawful discriminatory employment practice for any employer (public or private)[179] to make any employment decision adverse to an employee or prospective employee based on any past criminal convictions[180] or "by reason of a finding of lack of 'good moral character' when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses."[181] However, taking into account the legitimate needs of employers and of society, the New York legislature has tempered these two requirements with another provision that expressly *allows* employers to take into account an employee's past criminal convictions or his lack of good moral character (flowing from criminal charges), but only in two situations.[182] First, an employer may discriminate against an employee where "there is a *direct relationship* between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual."[183] Second, an employer may also act adversely to an

175. *See* N.Y. CORRECT. LAW §§ 750–754 (McKinney 2008).

176. *See* N.Y. EXEC. LAW § 296(16) (McKinney 2008).

177. *See id.* There are some additional limits listed in this section. *See id.* (providing for a prohibition on the use of ex-offender status in most cases where a record has been sealed).

178. Just like being African American has no bearing on one's fitness for work, neither does being charged with a crime and subsequently exonerated.

179. *See* N.Y. CORRECT. LAW §§ 750–751.

180. *See* N.Y. CORRECT. LAW §§ 750–754. Note that these requirements also apply to the denial of a license by a licensing agency. *See id.* § 752. Thus, when this Note says "denial of employment by employer" the same analysis will apply to the "denial of a license by a licensing agency."

181. *Id.* § 752.

182. *See id.*

183. *Id.* § 752(1) (emphasis added). Note the "license" provision. This statute deals not only with employment decisions, but also with decisions to grant or deny licenses. *See id.*

employee where "granting or continuation of the employment would involve an *unreasonable risk* to property or to the safety or welfare of specific individuals or the general public."[184] As guidance in applying these two exceptions, the New York legislature created a list of factors that an employer must consider when attempting to make an adverse employment decision on the basis of one of these exceptions.[185] These factors include, among others, "[t]he public policy of . . . encourag[ing] the licensure and employment of persons previously convicted of one or more criminal offenses;" the types of duties and responsibilities included in the position in question; whether such conviction or offense will have any bearing on the duties proscribed to the employee; how much time has elapsed since the conviction or offense; the seriousness of the offense; and the safety and welfare of the general public.[186]

As an extra protection for ex-offenders, and perhaps to make review of an employer's negative employment decision easier on courts, New York's statutory scheme also provides for the issuance of "a certificate of relief from disabilities" in certain instances.[187] A certificate of relief from disabilities is essentially a statement that an ex-offender is in good standing with the court or parole board,[188] and may be issued by a court[189] or parole board[190] so long as three conditions are met: (1) the person to whom it is issued must have been previously convicted of an offense, but must not have been convicted of more than one felony;[191] (2) issuance of the certificate must be "consistent with the rehabilitation of the eligible offender;"[192] and (3) "[t]he relief to be granted by the certificate [must be] consistent with the public interest."[193] This certificate effectively creates a presumption of rehabilitation, which the employer must rebut in order to take advantage of the exception to the general rule prohibiting discrimination based on ex-convict status.[194] The wisdom of such a provision cannot be overstated; it makes logical sense that it should be more difficult for an employer to justify an adverse employment decision when a court or parole board is convinced not only of the ex-offender's rehabilitation, but also of the fact that the ex-offender poses limited—if

184. *Id.* § 752(2) (emphasis added).

185. *See id.* § 753(1). Analysis of these factors is mandatory. *See id.*

186. *Id.*

187. *See id.* § 753(2).

188. *See id.* §§ 701–703.

189. *Id.* § 702.

190. *Id.* § 703.

191. *See id.* §§ 701–703. The first requirement is that the person be an "eligible offender." *Id.* §§ 702–703. However, "eligible offender" is defined as "a person who has been convicted of a crime or of an offense, but who has not been convicted more than once of a felony." *Id.* § 700(1)(a).

192. *Id.* §§ 702–703.

193. *Id.*

194. *See id.* § 753(2).

any—risk to the public. Also, it makes sense to limit the availability of such a certificate to those who have committed only one felony.[195]

The main utility of the New York approach is the fact-sensitive inquiry that employers must undertake before they can make adverse employment decisions based on ex-offender status. The inquiry forces employers to weigh the risks and benefits of employing (or licensing) an ex-offender.[196]

New York law is also superior because it produces just results in the courts. For example, in *In re La Greca Rest, Inc.*,[197] the court reversed a decision by a licensing agency[198] that based its denial of applicant's liquor license on the applicant's criminal history.[199] Noting that "consideration must be given to the circumstances of any criminal conviction as well as to the extent to which rehabilitation has occurred" the court concluded that the agency had failed to take into account the "intervening 9 years since [applicant's] last conviction [and that] Rivera led an exemplary life" since then and thus that issuance of the license was appropriate.[200] In contrast, in *In re Markman*,[201] the court approved denial of a dental license on the grounds that criminal incidents were repeated and recent in comparison to those in *In re La Greca Rest, Inc*.[202] These cases demonstrate the fairness of New York's approach. They also show the benefits of protecting ex-offenders by placing significant limits on employers' rights to make decisions based on ex-offender status, while at the same time protecting an employer's right to deny an ex-offender employment where the public, people, or property would be at risk, or where the employee's ability to perform his job would be affected. It is hard to see what other legitimate reasons one would have for denying employment to an ex-offender;[203] so

195. However, there will always be a certain degree of line-drawing. Perhaps a court or parole board should have similar discretion where an ex-offender has committed more than one felony.

196. *See* N.Y. CORRECT. LAW §§ 752–753.

197. 304 N.Y.S.2d 165 (App. Div. 1969).

198. *Id.* at 166. Recall that the same requirements apply to denying licenses as denying employment. *See* N.Y. CORRECT. LAW §§ 750–755.

199. *In re La Greca Rest, Inc.*, 340 N.Y.S.2d at 166–67.

200. *Id.* at 167.

201. 516 N.Y.S.2d 359 (App. Div. 1987).

202. *Id.* at 360; *see also* Soto-Lopez v. N.Y. City Civil Serv. Comm'n, 713 F. Supp. 677, 678–79 (S.D.N.Y. 1989) (holding that an applicant for a caretaker position with New York Housing Authority, otherwise qualified for such a position, was illegally denied a position based solely on a prior manslaughter conviction where the tasks of the employment were neither shown to be directly related to a prior conviction nor did the nature of the offense present an unreasonable risk to persons or property, and where statutory policy favors the employment of ex-offenders).

203. There are other reasons for denying employment to an ex-offender, but they do not appear legitimate—especially not in the eyes of the New York legislature. For example, an employer could claim that the stigmas associated with criminal convictions are so severe as to justify exclusion from employment, possibly on the grounds that employment would give the business a bad image. However, such reasons are not legitimate in light of the compelling public policy supporting the rehabilitation of ex-offenders. *See, e.g.*, Peluso v. Smith, 540 N.Y.S.2d 631, 634 (App. Div. 1989)

long as the public and the workplace is safe, and so long as the employee can effectively perform the job, the continued denial of employment can be traced merely to prejudice. Such an arrangement would impede the successful re-integration of ex-offenders into society, without providing additional utility to the employer, society, or the ex-offender.[204] Additionally, by applying these requirements to both public and private employers,[205] New York has abolished an arcane and artificial distinction that was long ago discarded in other areas of the law in the name of badly needed social change.[206]

Having demonstrated the superiority of the New York approach, it is prudent to note the nexus the legislative scheme bears to negligent hiring law in New York. Most importantly, one must consider the leeway given to employers in New York's "factor-analysis" when considering the propriety of an adverse employment decision. For example, under the factor-analysis test, an employer would not feel statutory pressure to hire as a schoolteacher a murdering, raping, and thieving ex-felon. However, an employer would presumptively be required by statute not to deny employment to someone convicted of a minor drug offense a few years ago—someone who was subsequently declared rehabilitated by the issuance of a certificate of relief from disability. True, these examples are extremes, and courts will no doubt face difficulty drawing lines in close cases. However, when an employer acts on a reasonable evaluation of the law, he will not be subject to liability when an employee commits an unforeseeable crime.[207] In sum, New York's "factor-analysis" approach seems to balance the employer's need to remain free from negligent hiring liability with the rehabilitated employee's need to find employment.

(examining New York's approach and concluding that the purpose of the legislation was to "try to remove prejudice against former criminals obtaining jobs or licenses" because the "[f]ailure to find employment [had] resulted in personal frustration, [had] injured society as a whole, and [had] contributed to a high rate of recidivism").

204. *See supra* note 203 and accompanying text; *cf.* Michael Meltsner et al., *An Act to Promote the Rehabilitation of Criminal Offenders in the State of New York*, 24 SYRACUSE L. REV. 885, 905 (1973) (discussing the incredibly strong public policy of rehabilitating ex-offenders as reflected in changes to New York law).

205. *See* N.Y. CORRECT. LAW § 751 (McKinney 2008). "[T]his article shall apply to any application by any person for a license or employment at any public or private employer . . . ." *Id.*

206. *See supra* note 173 and accompanying text.

207. If a statute prohibits an inquiry, it is then illegal for the employer to pursue that inquiry. If no other avenues exist to find out about criminal history, any such history would by definition be "unforeseeable." *See generally supra* Part II.

C. *Implementing a National Solution: Amending the Fair Credit Reporting Act*

In adopting the Fair Credit Reporting Act (FCRA),[208] one of Congress' primary goals[209] was to protect the prospective employee from inaccurate or arbitrary information being used to make an adverse decision in the employment process.[210] Recognizing that most information about consumers, including criminal record information, is transmitted to employers by "consumer reporting agencies,"[211] the FCRA requires "that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer . . . information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information."[212] Because one of the FCRA's foci is the relevance of consumer information, extending the Act to require employers to use the information reported to them in ways relevant to an employment decision seems a logical extension of the FCRA's current reach. Thus, by adding New York's restrictions on employers' uses of criminal record information to the FCRA, Congress could effect a greatly needed federal preemption, and improve uniformity among the states.

V. CONCLUSION

If something is not done about the current incarceration rate, an estimated one in fifteen Americans will serve time in prison and an even more astounding 32% of African-American males will spend part of their lives behind bars.[213] The overcrowding of the American prison systems is as bad at it has ever been,[214] and the worst may be yet to come if the rising

208. Fair Credit Reporting Act, Pub. L. No. 90-321, 82 Stat. 146 (codified as amended at 15 U.S.C. §§ 1681–1681x (2006)).

209. The FCRA has many other purposes including ensuring fairness in the procedure of "investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers . . . ." *See* 15 U.S.C. § 1681(a)

210. *See, e.g.*, Ackerley v. Credit Bureau of Sheridan, Inc., 385 F. Supp. 658, 659 (D. Wyo. 1974) ("The general purpose of the FCRA is to protect the reputation of a consumer, for once false rumors are circulated there is not complete vindication."); Porter v. Talbot Perkins Children's Servs., 355 F. Supp. 174, 176 (S.D.N.Y. 1973) ("The purpose of the Fair Credit Reporting Act is to protect an individual from inaccurate or arbitrary information about himself in a consumer report that is being used as a factor in determining the individual's eligibility for credit, insurance or employment.").

211. Actually, "consumer reporting agency" is simply a defined term in the FCRA that is worded to include any individual who, for a charge, transmits any information to an employer (or other third party). *See* 15 U.S.C. § 1681a(f).

212. *Id.* § 1681(b).

213. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *supra* note 8.

214. *See* Andrew H. Malcolm, *States' Prisons Continue to Bulge, Overwhelming Efforts at Reform*, N.Y. TIMES, May 20, 1990, at A1 (explaining that "[v]irtually every state prison system is being pushed beyond its intended capacity" and that even "$4 billion in new prison construction

rate of recidivism is not addressed.[215] However, with the increase in workplace violence,[216] and the subsequent need for and rise of the tort of negligent hiring, things may get worse for ex-offenders before they get better. Unless Congress or the courts provide meaningful protections against employers' unbridled uses of criminal records in employment decisions, it may be difficult, if not impossible, for ex-offenders to break free of their proverbial shackles and find meaningful employment.

Indeed, because current federal protections are nearly non-existent, and because state protections are widely inconsistent and insufficient in nearly every jurisdiction, many ex-offenders may find themselves haunted by the stigmas of their pasts;[217] stigmas that are kept alive through employers' increased uses of criminal records for hiring and firing purposes. It is time for a national solution to this ever-increasing problem. Amending the FCRA and imposing federal restrictions upon employers' rights to use ex-offender status in employment decisions may be the best way to accomplish this objective. New York's statute, with its careful balance of employers' and employees' interests, could serve as a helpful guide to Congress. However, one thing is for certain: if action is not taken soon, out of jail may really mean out of luck.

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authorized [in 1989], in addition to $4.4 billion in 1988, cannot keep pace with the growing number of convicted felons"); Editorial, *American Prison Population Surpasses 2 Million, the Highest Incarceration Rate in the World*, SALT OF THE EARTH, April 2003, http://salt.claretianpubs.org/sjnews/2003/04/sjn0304f.html (comparing the U.S. prison system to the international community and commenting that "[t]he rate of incarceration in the United States, 702 inmates per 100,000 residents, continues to be the highest in the world").

215. Over the first six months of 2002, the amount of prisoners in state and federal prisons increased by 2%. *Id*. From June 30, 2002 to April 2003, the number of prisoners nationwide increased from 1.35 million to more than two million. *Id.*

216. *See* Deborah A. Ballam, *Employment References—Speak No Evil, Hear No Evil: A Proposal for Meaningful Reform*, 39 AM. BUS. L.J., 445, 448, 450 (2002) (explaining that workplace violence is on the increase and citing frightening statistics, such as the fact that "[a]pproximately 100 bosses and co-workers annually are murdered by employees, and thousands more are victims of workplace assaults"). Dayna B. Royal, *Take Your Gun To Work And Leave It In The Parking Lot: Why The Osh Act Does Not Preempt State Guns-At-Work Laws*, 61 FLA. L. REV. 475, 476–77 (2009).

217. *See* Rasmusen, *supra* note 6, at 520–21.